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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

THE INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY,
Appellants,

vs.

THE CITY OF JERSEY CITY, FRED M. VINSON, STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 3073

CITY OF JERSEY CITY,

and *Plaintiff,*

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR,

vs. *Intervenor,*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY,

Defendants.

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The defendants-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C. Title 28, Section 47a [Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 41 (28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C. Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

U. S. C. Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 345 [Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

B. **The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved.**

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

There are involved, however, the following questions as to the construction of certain statutes of the United States:

(a) How far, if at all, the powers of the Interstate Commerce Commission under Part I of the Interstate Commerce Act (Title 49, Chapter 1, U. S. C.), to determine, prescribe, and authorize just and reasonable rates in interstate commerce for a common carrier by railroad are affected or modified by the provisions of the Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 et seq.), and by the Inflation Control Act (Stabilization Act) of 1942 (Act. Oct. 2, 1942, Title 50, U. S. C., Secs. 961 et seq.).

(b) Whether the interest of the intervenor, as the agency designated by the President under the provisions of said Inflation Control Act to receive notice of any general increase in the rates or charges of any com-

mon carrier over those in effect September 15, 1942, and to intervene before the Federal, State or municipal authority having jurisdiction to consider such increase, is limited under such intervention before the Interstate Commerce Commission to the question whether such increase in rates or charges will result in inflation or increased cost of living in contravention of the provisions of said Inflation Control Act and of said Emergency Price Control Act, or extends to the question whether such increase is reasonable and otherwise lawful under the provisions of said Interstate Commerce Act, irrespective of whether it will result in such inflation or increased cost of living.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The order and decree sought to be reviewed was entered on January 14, 1944. The petition for appeal, together with an assignment of errors, was presented on February 9, 1944.

D. Nature of Case and of Rulings Below.

This is an appeal from a final order and decree of the District Court of the United States for the District of New Jersey entered January 14, 1944, setting aside, annulling and perpetually enjoining two orders of the Interstate Commerce Commisison, respectively of June 8, 1943 and November 2, 1943, in I. & S. Docket No. 394, *Passenger Fares of Hudson & Manhattan R. Co.*, 255 I. C. C. 649, 256 I. C. C. so far as said orders permit the establishment of any local interstate fare in excess of 8 cents for transportation on the downtown line of the defendant Hudson & Manhattan Railroad Company, and further ordering and decreeing that such proceedings be remanded to the Interstate Commerce Commission for further hearing and reconsideration

in accordance with the views expressed in the opinion of the District Court.

The Commission's order of June 8, 1943, authorized the defendant Hudson & Manhattan Railroad Company to charge a 9 cent fare on its downtown line.

The Commission's order of November 2, 1943, authorized said defendant to charge in lieu of said 9 cent fare previously authorized, alternative fares of 11 tokens for $1 or a cash fare of a dime, provided, however, that such alternative fares should also be made applicable to said defendant's uptown line upon which the authorized and existing fare was 10 cents.

Both the Commission's order of June 8, 1943 and of November 2, 1943, were limited to the duration of the war and six months thereafter.

On hearing, an interlocutory injunction was granted by said Court on November 26, 1943, against the same orders of the Commission, from which interlocutory injunction an appeal by the defendant Hudson & Manhattan Railroad Company has likewise been taken to the Supreme Court of the United States.

I.

Nature of Case.

A statement of the historical background to show how the case arose is essential. Unfortunately, because the rulings of the Court below were based on questions of fair hearing, of estoppel and of failure to exhaust administrative remedies, such statement must be longer than would otherwise be desirable.

The Commission issued an original report in these proceedings on July 11, 1938 (227 I. C. C. 741), denying the defendant carrier the right to increase its fares on its downtown line from 6 to 10 cents but authorizing an increase to

8 cents. Commissioners Miller and Mahaffie dissented on the ground that the Commission should have authorized the proposed 10 cent fare on the carrier's downtown line. Commissioner Eastman did not participate.

The carrier sought an injunction in the same District Court against the Commission's order limiting it to such 8 cent fare and in an opinion by District Judge Fake the order was sustained (36 Fed. Supp. 495). On appeal by the carrier to the Supreme Court of the United States the order of the District Court was affirmed in a *per curiam* opinion. (313 U. S. 98).

Upon petition of the carrier alleging fundamentally changed conditions and asking the Commission to reconsider its denial of a 10 cent fare on such downtown line, the Commission by its order of July 13, 1942, reopened the proceedings for further hearing. Full and elaborate hearings were held at which the intervenor appeared but offered no testimony whatever. On the contrary the intervenor in his exceptions to the Examiner's report filed subsequent to such hearings, expressly conceded:

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

The intervenor did contend that such increased fare in conjunction with other increased costs of living would result in an inflationary spiral but offered no evidence whatever in this or any other respect.

On or about January 25, 1943, the Examiner issued a proposed report recommending that the carrier be permitted to increase its fare on its downtown line to 10 cents.

On April 20, 1943, argument on such proposed report was held before the entire Commission. On such argument, an exhibit was filed upon stipulation of the parties, showing

the carrier's traffic and revenue for the first two months of 1943—the latest figures then available.

Thereafter, the Commission made its report, findings and order of June 8, 1943 (one of the two orders here enjoined). The Commission overruled the Examiner's recommendation that the carrier be permitted to increase the fare on its downtown line to 10 cents and limited the increase to 9 cents, although the carrier had presented some evidence that, by reason of the physical limitations of its fare collection boxes, which limitations could not be obviated, it would be impossible to collect a 9 cent cash fare.

Commissioners Miller and Mahaffie again dissented, being joined by Commissioner Patterson, on the ground that the record fully justified such increase. Commissioner Miller, concurring in part, stated:

> "I concur in the finding of the majority insofar as it gives approval to increasing the present fare to 9 cents. In my dissent to the prior report, 227 I. C. C. 741, I expressed the view that the record there amply justified a finding that the proposed fare of 10 cents would be reasonable and lawful for the services performed by this respondent. Nothing is presented as a result of the further hearing to cause me to change that opinion.
>
> "Moreover, I see no sufficient reason for here limiting the time during which the 9 cent fare shall remain in effect.
>
> "I am authorized to state that Commissioners Mahaffie and Patterson join in this expression."

Commissioner Aitchison did not participate in the disposition of this proceeding.

On July 8, 1943, the carrier filed a sworn petition for reconsideration and modification of the Commission's findings and order of June 8, 1943. The petition set out in greater detail the facts of such physical limitations of its fare col-

lection boxes and facts showing that the only means of practical compliance with the Commission's findings and order of June 8, 1943 would be to charge, in place of the uncollectible 9 cent cash fare, alternative fares of 11 tokens for $1 or a cash fare of a dime, applicable both to the carrier's downtown and uptown lines. The petition asked that authority be granted to charge such fares as soon as tokens could be obtained and the carrier's fare collection boxes modified, and, in the meantime, to charge a straight 10 cent cash fare on the carrier's downtown line. It also asked the Commission to eliminate the limitation on such increased fares to the period of the war and six months thereafter. The petition asked that any party to such proceedings who might be opposed to the granting of the petition be required to file a verified reply thereto within ten days and that the Commission, upon the basis of such petition and any replies, determine without further hearing the issues thereby presented. As ground for such procedure, there was attached to the petition an affidavit showing that, since the effective date of the Commission's order of June 8, 1943, the carrier had suffered a loss in excess of $1,000 per day because of its inability to collect the authorized 9 cent cash fare and that the carrier will continue to lose such amount until the proposed alternative fares should become effective.

The plaintiff, without itself filing any petition for reopening or reconsideration of the Commission's order of June 8, 1943, as permitted by the Commission's General Rules of Practice, on July 14, 1943 filed an unverified reply to the carrier's petition. That reply alleged *inter alia:*

> "It is the position of protestants that the petition should be denied and that the effect of the decision, dated June 8, 1943, should be indefinitely suspended, and, in view of the questions and assertions now brought forth by the respondent, that the proceeding

should be set for further hearing. Otherwise, the petition, in its entirety, should be denied."

In such reply, the intervenor stated:

> "In view of Petitioner's tremendously improved current earnings, it is requested that the Commission reconsider its proposed modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."

It should be noted that, under the Commission's General Rules of Practice, these statements in the respective replies of the plaintiff and intervenor did not constitute a petition for reconsideration or reopening of the Commission's order of June 8, 1943 in either form or substance and, in any event, were filed after the time had expired under those rules for such a petition.

The intervenor also filed a substantially similar and unverified reply to the carrier's petition.

The Commission on August 3, 1943, issued a report, findings and order based upon the carrier's petition and such unverified replies, and without further hearing. After noting that it had overlooked the evidence introduced by the carrier prior to the Commission's order of June 8, 1943, showing that it would be impossible for the carrier to collect a 9 cent cash fare, and also noting that on this account the carrier was losing in excess of $1,000 a day of the revenue the Commission had intended to accord the carrier by such order, and on a specific finding that it would be impossible for the carrier to collect a 9 cent cash fare, the Commission found:

> "Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased

local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line."

The Commission, however, denied so much of the carrier's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied the carrier the right to charge a 10 cent cash fare on its downtown line pending its ability to obtain tokens and modify its fare collection boxes. Commissioners Miller, Mahaffie and Patterson again dissented on the ground that on the record before the Commission it should authorize a straight 10 cent fare on the carrier's downtown line. Commissioner Aitchison did not participate.

On September 13, 1943, the plaintiff filed its original complaint in these proceedings specifically asking that the Commission's order of August 3, 1943, be enjoined only

> "in so far as such order permits the establishment of any local interstate fare in excess of 9 cents for transportation on the downtown line."

Said complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> "17. It is apparent that the Commission, in authorizing local downtown fares in excess of the nine cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649,

does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross-examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure."

While the intervenor did not formally intervene in such original complaint, his counsel on a subsequent hearing on September 28, 1943 before the Commission, hereinafter referred to, stated that he did not so intervene because of the Commission's order of September 18, 1943, reopening the proceedings, to which reference will now be made.

On September 18, 1943, the Commission of its own motion reopened the proceedings for further hearing. The grounds on which it acted are stated in the Commission's report of November 2, 1943, as follows:

"On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been 'deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *.' *Accordingly, out of an abundance of caution,* by order of September 18, 1943, we reopened this proceeding for further hearing 'to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943,' and to afford 'any party hereto * * * the right to cross-examine adverse witnesses.' Such further hearing has been held, and upon the filing of briefs the matter has been submitted for our further decision." [Italics supplied.]

On the further hearing held under the Commission's order of September 18, 1943, the carrier offered evidence to show that it was impossible, because of the physical limitations of its fare collection boxes, which could not be obviated, to collect a cash fare of 9 cents and that the only practical means of substantial compliance with the Commission's order of June 8, 1943 would be to apply both to the downtown and uptown lines alternative fares of 11 tokens for $1.00 or a cash fare of one dime.

The carrier, in order to show that it was losing in excess of $1,000 a day through its inability to collect the authorized 9 cent fare, *itself introduced an exhibit showing passenger traffic and revenue for the eight months ended August 31, 1943, adjusted to twelve months.*

On such further hearing, held September 28 and 29, 1943, plaintiff offered no evidence whatever within the limitations of the Commission's order. The only evidence offered by the intervenor in this respect was confined to an effort to prove that the carrier's estimate of the potential ratio of use of token fares to cash fares under such alternative fares was erroneous.

Both the plaintiff and the intervenor, however, endeavored to offer certain evidence and to develop by cross-examination certain data with reference to the current revenues and operating expenses of the railroad company, for the professed purpose of showing that, because of the increase in traffic, the carrier would earn revenue in excess of that to which the plaintiff and intervenor claimed the Commission had intended to limit the carrier under its order of July 11, 1938, and to show that, under a continuance of its existing 8 cent fare, the carrier would earn its full current bond interest requirements, all for the ultimate purpose of showing that the carrier was not en-

titled to 9 cents on its downtown line, authorized by the Commission's order of June 8, 1943, but should be restricted to the 8 cent fare authorized by the Commission's order of July 11, 1938.

Included in such offered evidence was a condensed corporate income statement of the Hudson & Manhattan Railroad Company for the seven months ending July 31, 1943. A similar statement for the five months ending May 31, 1943 had been attached to the reply of the intervenor of July 19, 1943 to the carrier's petition of July 8, 1943 for reconsideration and modification of the Commission's findings and order of June 8, 1943. In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of the Hudson & Manhattan Railroad Company from railroad operations but was a consolidated statement of the income of that company from all operations, including its Hudson Terminal Buildings and other real estate.

The Examiner rejected such evidence and refused to permit such cross-examination as not being within the limitations of the Commission's order of reopening of September 18, 1943 but specifically advised counsel for the plaintiff and intervenor that if they desired to broaden the issues, they could petition the Commission for a modification of that order for the purpose of receiving the rejected evidence and cross-examination.

On October 14, 1943, the intervenor filed a petition for modification of the Commission's order of September 18, 1943,

> "to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the

company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942."

The only specifications in such petition of the purpose of adducing such evidence read as follows:

"8. Counsel for the protestants stated if given an opportunity to demonstrate by presentation of evidence at the hearing he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase (R-2448 ff). Such opportunity was denied".

On October 25, 1943, the carrier filed a reply to the intervenor's petition, pointing out that the plaintiff had neither filed an independent petition nor joined in that of the intervenor, and alleging that the plaintiff's failure so to do was occasioned by plaintiff's recognition that it would stultify the plaintiff's original complaint then pending before the District Court, which in substance asked that the Commission and the carrier be required to abide by the Commission's order of June 8, 1943 authorizing a 9-cent fare on the downtown line. Such reply also pointed out that the Commission neither under its order of July 11, 1938 nor under its order of June 8, 1943, had undertaken to limit the revenue which the carrier might earn under the 8-cent and 9-cent fares therein respectively authorized, but had merely estimated what revenue the carrier would earn under such fares in view of existing competition in other forms of transportation; further, that the carrier plainly was not

limited by law to earning merely its current interest on its bonds.

By a letter dated October 25, 1943, counsel for plaintiff purported to

> "'adopt and otherwise ratify the contents of the aforesaid (intervenor's) petition as though it were our own.'"

This letter did not comply with the Commission's General Rules of Practice either as to form, content, time, or service of petitions for rehearing, reargument, or reconsideration, and consequently was not treated as such by the Commission in its report of November 2, 1943.

On November 2, 1943, the Commission issued its report and order which the District Court has enjoined.

The Commission's report, after reciting, as already quoted, that they had issued their order of reopening of September 18, 1943 "out of an abundance of caution" states, with reference to the further hearing held on September 28 and 29 under that order:

> "At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding 'for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942,' called the Stabilization Act. To this motion respondent replied. Movant states that he

wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted."

The Commission then states:

"In the complaint of the City of Jersey City before the District Court [i. e. the original complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to 9-1/11 cents."

The Commission then concludes:

"At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled."

Having reached these conclusions, the Commission then made the following findings of fact, which it underscored in its report, stating under each finding the evidence of record upon which such finding was based. For the sake of brevity such statements of the evidence underlying such findings are here omitted. The findings themselves are as follows:

"Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.*

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.*

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.*

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report (i. e. June 8, 1943) as necessary to insure adequate transportation service.*

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.*

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.*

The Commission then stated:

"Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we af-

firm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and maintenance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.

Respondent asks for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in section 6(3) of the act. A downtown fare of 9 cents was approved by us on June 8, 1943, and, in the ordinary course, if collectible, that fare would now have been in effect for about 4 months. Accordingly, we feel warranted in exercising the powers given to us in section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice.

An order overruling the aforesaid motion of the Director of Economic Stabilization, and granting permission to respondent to establish the fares herein approved upon not less than 15 days' notice, will issue."

Commissioners Miller, Mahaffie and Patterson reiterated their view, previously expressed in connection with the Commission's reports and orders of June 8, 1943, and August 3, 1943, that the Commission should have authorized the carrier to charge a straight 10 cent fare on its downtown line. Commissioner Atchison again did not participate.

On November 18, 1943, plaintiff filed its amended complaint herein asking that the Commission's orders of June 8, 1943 and November 2, 1943 be perpetually set aside, annulled and enjoined insofar as they permitted any fare on the carrier's downtown line in excess of 8 cents (the fare

authorized by the Commission's order of June 11, 1938). The basic ground of such amended complaint was (a) that the carrier because of increase in traffic did not need the 9 cent fare authorized by the Commission's order of June 8, 1943, and (b) that the Commission in issuing its order of November 2, 1943, had done so without according full hearing because of its refusal to receive the evidence and permit the cross-examination excluded by the Examiner at the hearing on reopening under the Commission's order of September 18, 1943.

The intervenor filed its petition of intervention asking similar relief and making similar allegations, but in addition alleging that the Commission's orders permitting an increase in the 8 cent fare in effect on the carrier's downtown line on September 15, 1942 (i. e. the fare authorized by the Commission's order of June 11, 1938) were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942.

The defendant United States of America filed a neutral answer on the ground that a question of the relative powers of two agencies of the government were involved.

The defendant, Interstate Commerce Commission, and the defendant carrier, Hudson & Manhattan Railroad Company, filed their respective answers to the amended complaint and to the intervenor's petition of intervention. Said answers, in substance, admitted the making of the orders of June 8, 1943 and November 2, 1943; denied that plaintiffs were not accorded a full and fair hearing; denied that said orders contravened either the Emergency Price Control Act or the Stabilization (Inflation Control) Act; and alleged that said orders were made after a full hearing and consideration of the evidence and argument of all parties and were fully supported by evidence before the Commission and by the Commission's findings based on such evidence.

In addition, the carrier in its answer and the Interstate Commerce Commission in its amended answer, alleged that neither the plaintiff nor the intervenor had exhausted their administrative remedies before the Commission; moreover, that both were estopped from seeking an injunction against the Commission's orders of June 8, 1943, and November 2, 1943 (a) because the original complaint herein asked an injunction against the Commission's order of August 3, 1943 only in so far as it authorized fares higher than the 9 cent fare authorized by its order of June 8, 1943 and only on the ground that a hearing had been denied as to such increase over 9 cents and (b) because the Commission was thereby induced to make its order of September 18, 1943 reopening the proceedings for the specific purpose of according a hearing on the sole issue on which a hearing was alleged to have been denied, i. e., the increase over its previously authorized 9 cent fare; and (c) because of other conduct of the plaintiff and the intervenor subsequent to such reopening.

II.

Rulings Below.

Both the plaintiff and the intervenor applied for an interlocutory injunction, which was granted November 26, 1943, and from which the carrier has taken an appeal to the Supreme Court of the United States.

Final hearing was had on December 14, 1943. On January 12, 1944, the majority of the Court, Judges McLaughlin and Meaney, granted the final order and decree, Judge Fake dissenting.

The opinion of the Court disposed of the matters involved under two headings, (1) "Full and Fair Hearing", and (2) "Economic Stabilization." It stated that in view of the conclusions which it reached under these headings "There

is no necessity for discussing the other points raised by the plaintiff and intervenor."

Under the heading "Full and Fair Hearing", the Court held:

First, that the enjoined orders of the Commission were based on Section 15(1) of the Interstate Commerce Act,* although neither of the enjoined orders so stated and although the original order to which they were amendatory was expressly based on both Section 1 and Section 15(a) of the Act.

Second, that on this assumption the plaintiff and intervenor had been denied full hearing by reason of the Commission's refusal to reopen the proceedings to receive evidence relating to the 1943 earnings of the carrier "for the purpose of showing that, under such earnings, no increase in fare whatsoever was justified." In this connection the Court quoted that portion of the Commission's report of November 2, 1943, reading as follows:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report [report and order of June 8, 1943] * * * the motion will therefore be overruled."

In connection with this language, the majority opinion said:

> "Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. *It actually considered the proposed evidence and decided that, despite it, its decision should stand.* The municipal plaintiff and the intervenor, by their evidence, offered to show that the carrier's rise in business and net earn-

* The majority presumably meant to refer to Section 15(a)—the so-called "Revenue" section of the Act.

> ings had completely removed any reason for an increase over the 8 cent fare. *In refusing to consider such testimony* which, under the terms of its tender went to the heart of the controversy, in our judgment, the Commisison did act arbitrarily and contrary to the mandate of its statute." [Italics supplied.]

The contradiction between the two italicized statements in the majority opinion is patent. The statement first italicized is obviously consistent with the Commission's own statement of its action as quoted by the Court.

Third, that the plaintiff and intervenor had exhausted their administrative remedies. Here the Court ignored the fact that neither the plaintiff nor the intervenor had ever within the Commission's rules of practice filed any petition for reopening, rehearing and reconsideration of the Commission's orders of June 8, 1943, and August 3, 1943, and that only the intervenor had petitioned for modification of the Commission's order of September 18, 1943.

Fourth, the Court made no reference to the issue of estoppel, except to say

> "We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above." [i. e., denial of full hearing]

Apparently the Court confused the question of estoppel with the question of refusal to exhaust administrative remedies. See the Court's finding of fact No. 30. In any event, the Court made no reference whatever to the fact that the original complaint herein asked an injunction against the Commission's order of August 3, 1943, only in so far as it authorized fares higher than the 9-cent fare authorized by its order of June 8, 1943, and only on the ground that hear-

ing had been denied solely as to such increase over 9 cents. Neither did the Court make any reference to the fact that the Commission itself stated that it issued its order of September 18, 1943, reopening the proceeding, "out of an abundance of caution" and for the specific purpose of according a hearing on the sole issue it was alleged to have denied one.

Under the heading "Economic Stabilization" the Court held that the Commission had not given sufficient consideration to the importance of this issue. It quoted only the Commission's conclusion with respect thereto in its report of June 8, 1943; omitted any reference to the facts shown by the Commission's report that the intervenor had presented no evidence whatever; omitted all reference to the intervenor's express admission that

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine.";

and omitted any reference to the Commission's lengthy discussion nevertheless in that report of the intervenor's contentions in its briefs in this respect. It based its ruling that the Commission had not sufficiently considered this question solely on the case of *Philadelphia Coke Company* v. *Chester Bowles*, United States Emergency Court of Appeals, December 15, 1943, and ignored, without mention, the decision of the Circuit Court of Appeals for the District of Columbia in *Washington Gas Light Company* v. *Byrnes*, 137 F. (2d) 547), which the defendants had cited to the Court.

Finally, the Court neither in its opinion, findings of fact nor conclusions of law, found that the Commission's orders of June 8, 1943, and November 2, 1943, were without evidence to support them or found that had the evidence which the Commission rejected been received, the Commis-

sion could not, as a matter of law, have made those orders.

Judge Fake dissented on five grounds:

First, that there was ample evidence to sustain the Commission's orders;

Second, that whether the excluded evidence would have changed the Commission's conclusions was a question for the Commission and not the Court to determine since there otherwise was evidence to sustain those conclusions;

Third, that the majority opinion invaded the province of the Commission in undertaking to determine when the Commission might in its discretion close a record;

Fourth, that the Commission had properly exercised such discretion in this case; and

Fifth, that the majority opinion also undertook to invade the province of the Commission in considering the subject of inflation which, Judge Fake pointed out, the very Executive Orders quoted by the majority recognized to remain with the Commission.

The questions presented by this appeal are substantial. Aside from the serious effect of the injunction upon the revenues of the defendant Hudson & Manhattan Railroad Company, the decision of the lower Court, if allowed to stand, would establish principles which would have far-reaching effects in permitting the Director of Economic Stabilization to impinge upon the jurisdiction of the Commission. In this respect, the appeal involves the first case under the Urgent Deficiencies Act of October 22, 1913, respecting the effect of the Emergency Price Control Act and of the Inflation Control Act on the administration by the Interstate Commerce Commission of its powers and duties under the Interstate Commerce Act to prescribe just and reasonable rates. Moreover, it involves the important question whether the Interstate Commerce Commission

may be deprived of the power to make an effective decision through denial of its right to determine as an administrative matter when a record involving continually changing economic conditions may be properly closed.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

New England Divisions Case, 261 U. S. 184;

Alton R. Co. v. *United States*, 287 U. S. 229;

United States v. *Northern Pacific Ry Co.*, 288 U. S. 490;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98;

Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U. S. 373; and

Int. Com. Com. v. *Hoboken Man. R. Co.*, decided December 6, 1943.

F. Opinion and Decree of the District Court.

Appended to this statement are copies of (1) the opinion of the District Court dated January 12, 1944, (2) the

findings of fact and conclusions of law of said Court dated January 12, 1944, and (3) the final decree of said Court sought to be reviewed, dated January 14, 1944.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated February 9, 1944.

DANIEL W. KNOWLTON,
Chief Counsel.
E. M. REIDY,
Assistant Chief Counsel,
(*For the Interstate Commerce Commission*).
JAMES B. EMORY,
Collins & Corbin.
JOHN E. BUCK,
THOMAS A. HALLERAN,
JOHN F. FINERTY,
(*For Hudson & Manhattan Railroad Company*).

APPENDIX "A".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants.*

Opinion.

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges.

McLAUGHLIN, *Circuit Judge:*

In this case the plaintiff, City of Jersey City, New Jersey, and the intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, prayed this Court to set aside, annul and perpetually enjoin, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.) the rate order issued by Interstate Commerce Commission on June 8, 1943 in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649), and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —). The order of June 8, 1943 authorized the said carrier to increase the fare on its downtown line (extending from Jersey City and Hoboken, New Jersey to Hudson Terminal in downtown New York City, New York) from eight to nine cents, for the duration of the war and six months thereafter, or until otherwise ordered by the Commission. The supplemental order of November 2, 1943 authorized the carrier, in lieu

of the nine cent downtown fare, to charge a cash fare of ten cents or a token fare on a basis of eleven tokens for one dollar, upon establishing an identical fare on the carrier's uptown line; the present uptown fare being ten cents, without a token fare. On November 26, 1943, after a hearing, this Court issued an interlocutory injunction suspending the enforcement of said rate orders pending final hearing on the merits.

FULL AND FAIR HEARING.

At the outset we are confronted with the vitally important question of whether the plaintiff and intervener were given a full and fair hearing by the Commission. From the facts, the petition by the carrier to the Commission, was one for additional revenue. The orders of the Commission were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing. The United States Supreme Court in Interstate Commerce Commission *v.* Louisville and Nashville Railroad Co., 227 U. S. 88, 33 Sup. Ct. Reports 185, stresses this. The Supreme Court said in that case at page 93:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. *v.* Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always

be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States *v.* Baltimore & Ohio S. W. R. R., 226 U. S. 14."

In the report and order of the Interstate Commerce Commission of June 8, 1943 appears the following:

"Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about 30 percent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

The same report and order also stated:

"It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

Following that order of June 8, 1943, the carrier filed a supplemental petition alleging inability to collect the allowed nine cent fare and asking for a token fare which amounted to nine and one-tenth cents and in the alternative, a ten cent cash fare. The intervener filed an answer to that supplemental petition asking that the Commission

"'in view of petitioner's tremendously improved current earnings * * *' to '*reconsider its previous modification of its original order and return petitioner's downtown fares to the original level of 8¢. This will serve the national program to keep down the cost of living.*'"

Then followed the Interstate Commerce Commission order of August 3, 1943 which allowed the prayer of the supplemental petition of the carrier. Thereafter, the municipal plaintiff filed its bill of complaint in this Court

with Fred M. Vinson, Economic Stabilization Director, intervening as a co-plaintiff. After that, the Interstate Commerce Commission, of its own motion, held a supplemental hearing which it confined solely to the practicability of the nine cent fare. At that hearing both the intervener plaintiff and the municipal plaintiff, attempted to present evidence relating to the 1943 earnings of the carrier for the purpose of showing that under such earnings no increase in fare whatsoever was justified. This offer was rejected by the examiner for the Commission. Both plaintiffs objected to such limitation of the scope of the hearing. In addition, cross-examination of a carrier witness by the plaintiffs as to a $240,000 charge for expenses alleged by the carrier and called War Damage Reserve, was refused by the examiner although it was strenuously suggested that such item was no longer acceptable, at least for any such amount. Thereafter the intervener plaintiff petitioned the Commission to modify its order of September 18, 1943 which limited the scope of the further hearing and to permit testimony of the earnings of the carrier since the original closing of the record, alleging that the record as it then stood was stale and did not reflect the true picture. The municipal plaintiff informally joined in that application by letter. The Commission, in its opinion of November 3, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."

Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. It actually considered the proposed evidence and decided that, despite it, its decision should stand. The municipal plaintiff and the intervener, by that evidence, offered to show that the carrier's rise in

business and net earnings had completely removed any reason for an increase over the eight cent fare. In refusing to consider such testimony which, under the terms of its tender went to the heart of the controversy, in our judgment the Commission did act arbitrarily and contrary to the mandate of its statute. As Mr. Chief Justice Hughes said in Atchison, Topeka & Santa Fe Railway Co. *vs.* United States, 284 U. S. 248, at page 262:

> "We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

In that case, which seems very much in point here, the Court also said, speaking as to the function of the Interstate Commerce Commission in such circumstances, page 262:

> "In the discharge of its duty, a fair hearing is a fundamental requirement. Interstate Commerce Comm. *vs.* Louisville & Nashville R. Co., 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied."

We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above. Starting with the intervener's answe on July 19, 1943 to the carrier's supplemental petition, these plaintiffs have ever since that time, been specifically requesting the Commission to reconsider its increase in fare order, in view of the carrier's tremendously improved current earnings. The intervener did it formally in its answer above referred to. Both plaintiffs strenuously urged it at the supplemental hearing and thereafter by the petition above referred to in which the Commission was requested to broaden the scope of its supplemental hearing so as to include evidence as to the carrier's 1943 earnings. The Commission order of November 2, 1943 definitely decided

that such new evidence would not be admitted. That order permitted the carrier to file and make effective the new tariffs on fifteen days notice. The Commission took the position that it was without power to further suspend the tariffs. In reality, therefore, both plaintiffs had exhausted their remedy before the Commission. In connection with this, the language of the order of June 8th above quoted, permitted any party of the proceeding to bring any changed conditions resulting in a different revenue situation to the attention of the Commission for a further hearing.

In passing, we do not see either under the I. C. C. statute or the relevant decisions that any request for rehearing is actually required prior to suit in this Court. In Baltimore & Ohio Railroad Co. *vs.* U. S., 298 U. S. 347, the United States Supreme Court held at page 371:

> "No Act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the commission prescribing rates or divisions."

By the language of its order of November 2, 1943, the Commission indicates plainly that it had actually passed upon and rejected the offer of the plaintiffs to present the 1943 earnings of the carrier in an effort to show that any increase in fare under the true present facts was not justified. In such situation the remedy of the plaintiffs before the Commission was exhausted; with the plaintiffs, if they wished to pursue the matter further, having no recourse but to come to this Court under the statute.

Economic Stabilization

We do not see that this phase of the case can be lightly brushed aside. Under present conditions, we doubt if its importance can be readily overestimated. Were these orders issued in violation of the national emergency policy of economic stabilization? The Commission said in its order of June 8, 1943:

> "It seems to us that an increase of 1 cent in respondents's downtown fare is unlikely to have any inflation-

> ary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

By that language, the Commission undoubtedly realized that the problem of inflation of the cost of living was involved in this particular rate increase. The Commission, without even considering the substantial proportionate increase as to the total fare, which amounts to approximately thirteen per cent, but simply having in mind the small amount in money the increase meant to each passenger taken alone, dismissed this phase of the matter as negligible. We do not see that there was ever any claim by the Director of Economic Stabilization that the raise in rates here by and of itself, would result directly in inflation. The gauge urged on behalf of Director Vinson was that set out in U. S. Gypsum Co. *vs.* Brown, 137 F. 2d, 360, where the United States Emergency Court of Appeals, speaking through Chief Judge Maris said at page 364:

> "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral. See Lincoln Sav. Bank *v.* Brown, 137 F. 2d 228."

In the case of Philadelphia Coke Company *vs.* Chester Bowles, U. S. Emergency Court of Appeals, December 15, 1943, not yet officially reported, the Court said:

> "In a complicated economy such as ours the phenomena of price increases are the result of a complex of causes, the interaction of many economic forces. When inflationary pressure is one of the major forces operating in the economy it is wholly unrealistic to consider the price of a single commodity as in an economic vacuum and say that no threat of an inflationary increase can be discovered. Each commodity price must then be

considered in the light of the fact that it forms an integral part of the whole price structure."

For the Interstate Commerce Commission to permit the Director to intervene is not enough under the relevant statutes, orders and directives with reference to price stabilization. It is, of course, true that the Price Administrator does not have the authority to regulate carrier rates nor is such authority claimed here by the intervener but it is apparent that the executive orders issued with reference to stabilization do furnish a basic guide for all government agencies concerned, including the Interstate Commerce Commission. The President's Executive Order No. 9250, issued October 3, 1942, reads in part:

"The guidance policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942;"

The President's Order of April 8, 1943, No. 9328 reads:

"'The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program:"

It does seem from these that the Commission here is under a distinct duty in this particular case to give full effect to war time conditions and the stabilization legislation. It seems further, that in characterizing the allowed increase to this carrier as negligible and not directly causing inflation, that the Commission has failed to consider the dangerous, cumulative effect of the present allowed increase in connection with all the other cumulative sources of inflation, perhaps small in themselves, but tending collec-

tively to defeat the vital policy of controlling inflation as indicated in the above referred to Executive Orders of the President and the Act of October 2, 1942.

In view of the conclusions we have reached, there is no necessity for discussing the other points raised by the plaintiff and intervener. A permanent injunction will issue against the Interstate Commerce Commission as to its orders of June 8, 1943 and November 2, 1943 with respect to the increase in fare on the carrier's downtown line as set out in said orders.

APPENDIX "B".

FAKE, District Judge, Dissenting:

This is not the first time the passenger rates of the Hudson & Manhattan Railroad Company have been considered by this court. The company filed a local passenger tariff to become effective September 1, 1937, providing for a ten cent fare on its downtown line. This led to protests and extended hearings resulting in the establishment of a rate of eight cents by the Commission, two members thereof dissenting because they believed the ten cent fare to be justified. Resort was then had to this court resulting in the sustaining of the eight cent rate so established. The opinion of this court on the subject is found in Hudson & Manhattan Railroad Company *v.* U. S., 33 Fed. Supp. 495, affirmed, 313 U. S. 98. Therefore, the issues now before us do not come without some knowledge of the prior record.

I agree with the prevailing opinion that the dispositive issues here arise on the question of arbitrary action by the Commission in refusing to receive and consider evidence offered by the Price Administrator and the City of Jersey City on September 28, 1943. An examination of the proffered evidence discloses on its face that it transcends the limitations placed on the receipt of evidence by the Commission in its reopening order of September 18, 1943.

In this connection it is found on looking back over the record that an eight cent fare as established in 1938 has continued in actual operation down to the present time. On

June 27, 1942, the Railroad Company petitioned the Commission for a further hearing and again sought authority to charge ten cents on its downtown line. Replies were filed to this petition by the City of Jersey City and divers others, and on July 13, 1942, the Commission issued an order opening the proceedings. Commencing on September 9, 1942, and running through September 19, 1942, hearings were held bearing upon the issues involved on the petition and replies. On September 17, 1942, the Price Administrator entered an appearance on the record and reserved the right to be heard and to file a brief. His representative was then asked whether he desired to introduce any evidence and his answer was "Not at this time." On November 13, 1942, the Commission issued an order permitting the Price Administrator to intervene. Sometime during January or February, 1943, a proposed report by the Commission was issued.

On March 8, 1943, exceptions to the proposed report were filed by the Price Administrator and also by the City of Jersey City and six other municipalities and divers bus lines. On March 18, 1943, the Railroad Company filed a reply to the exceptions. On April 20, 1943, a stipulation to supplement and bring the record up to date was filed showing the total patronage and revenue of the Railroad Company for the months of January and February, 1943, and on that date oral argument covering all the issues then pending took place before the Commission. On June 8, 1943, the Commission filed a report and order establishing a nine cent fare on the downtown line, three of the Commissioners however maintaining the view that a flat fare of ten cents was reasonable.

On July 8, 1943, the Railroad Company filed a petition for reconsideration and modification of the Commission's order of June 8, 1943, on the ground that mechanical difficulties prevented its operation. On July 14, 1943, the City of Jersey City, *et als.*, filed a reply to the Railroad Company's petition. On July 19, 1943, the Price Administrator filed a reply.

The petition of the Railroad Company last above mentioned and the replies thereto raised certain issues bearing

on difficulties confronting the Railroad Company in the matter of the collection of the nine cent fare, and the Commission found that by reason of the peculiar construction and operation of the mechanical fare-collecting devices, nine cents, however divided, could not be received and properly counted in these devices; that other means of collecting that sum were impractical because in each instance they would result in unreasonable expense to the Railroad Company and involve serious delays in the discharge of its passengers. The evidence shows clearly that speedy discharge of passengers is of prime importance because the schedules of the connecting railroads are arranged to prevent traffic congestion. For these, and other reasons, the Commission entered its order of August 3, 1943, modifying its order of June 8, 1943, permitting a fare of one dime or the use of eleven tokens at $1.00 for eleven rides on both the uptown and downtown lines. This afforded the uptown passengers a fare of 9-1/11¢ where under the prior order of June 8, 1943, they were to pay ten cents and would cause the downtown passengers to pay 9-1/11¢ where under the prior order they were to pay nine cents. In this connection it seems to me the Commission functioned fully within its lawful sphere of action, and down to this point I am not able to find even the slightest question of arbitrary action. There was ample evidence before the Commission to bring their action within the rule laid down by the decision of the United States Supreme Court above cited, and in this connection it was not then and is not now within the province of this court to weigh the testimony and form a conclusion in conflict with the Commission's findings of fact. The Commission must be sustained whenever it appears that "there was evidence to support the Commission's findings." Such were the words of the Supreme Court.

On September 13, 1943, the City of Jersey City filed its complaint in this court and the Price Administrator was subsequently permitted to intervene in this action.

On September 18, 1943, the Commission entered its order reopening the proceedings, limiting the same as follows: "for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawful-

ness of the modifications made by the Commission in its report of August 3, 1943 * * * that at such further hearing any party hereto shall have the right to cross-examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission." All of which clearly discloses the intent of the Commission to consider all issues closed save only the one specifically referred to.

Thereafter on September 28, 1943, and of course after the institution of the suit here, the representatives of the City of Jersey City and of the Price Administrator attempted to introduce evidence bearing upon the earnings of the carrier for the first six months of the year 1943, for the purpose of showing that there was no justification for the increased fare allowed either under the order of June 8, 1943, or the order of August 3, 1943, and that the action of the Commission was inflationary. Also it was sought to cross-examine witnesses who had appeared at prior hearings and testified in relation to a $240,000 charge made by the Railroad Company for war damage reserve. It is my view that when by stipulation as hereinbefore appears, evidence was introduced bearing upon the earnings for the months of January and February, 1943, this made the evidence reasonably current and timely. However, here the Commission functioned with open eyes within their discretionary powers and this court cannot usurp their functions on the question of reasonable time as applied to the timeliness of the record. Rate making is a highly specialized art. The Commissioners had evidence on the subject before them and listened to arguments on that point and we should not substitute our judgment for their's. Prior to June 8, 1943, the Commission had given full opportunity for the introduction of evidence and arguments were heard bearing upon the $240,000 item. As to the proffered new evidence, the Commission said in its report of November 2, 1943, "* * * we have no reason to believe that, if the

additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

Of course the flow of economic change never stops—always and forever the comings and goings and doings of man have their effect in preventing a static period at which time the Commission might stop and make a decision. Always the point of termination must be fixed in the midst of fluctuations in the economic factors involved. It is my view that this court should not enter the province of the Commission in considering the subject of inflation. They were charged with the duty of passing on it by reason of the executive order on that subject and dealing as they do from day to day with economic factors, they constantly are kept advised in that field, and I believe their action here resulted from close attention to all the factors involved including inflation.

A careful study of the record convinces me that there was ample evidence to sustain the validity of each of the rulings made by the Commission herein and I am therefore unable to concur in the prevailing opinion.

APPENDIX "C".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants*.

Findings of Fact and Conclusions of Law.

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges.

FINDINGS OF FACT.

1. This action was brought by the City of Jersey City, New Jersey and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, against the United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, for the purpose of setting aside, annulling and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943 in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. --).

2. Plaintiff is a municipal corporation in the County of Hudson, State of New Jersey and is a body politic.

3. The intervener plaintiff is the agency designated by the President to receive notice of any increase in the rates

or charges of common carriers or other public utilities, pursuant to the Emergency Price Control Act of January 30, 1942, as amended October 2, 1942 (Public Laws 421 and 729, 77th Congress, 2nd Session); with authority to intervene and participate in proceedings before Federal, State and municipal authorities in connection with proposed increases in such rates and charges.

4. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

5. The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

6. The defendant, Hudson & Manhattan Railroad Company, is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey.

7. The matters covered by the aforesaid orders of the Commission relate to transportation and arose in part in the District of New Jersey. This Court has jurisdiction.

8. Defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, and is subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I. It transports no baggage, freight or express matters.

9. The defendant, Hudson & Manhattan Railroad's property consists of an underground rapid transit passenger railway, operated exclusively by electric power of the three rail type, and furnishing transportation facilities between points in Jersey City and Hoboken, New Jersey and downtown and uptown New York City. On its downtown line, this defendant's trains operate between (a) the Jersey City, New Jersey stations of Exchange Place, Grove

and Henderson Streets and Journal Square, and said defendant's downtown terminal at Hudson Terminal, New York City and (b) between the Jersey City, New Jersey stations at Exchange Place and Erie Stations and Hoboken, New Jersey and the said downtown terminal at Hudson Terminal. On its uptown line the trains operate (a) between the Hoboken, New Jersey station and the uptown New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the Jersey City, New Jersey stations of Journal Square, Grove and Henderson Streets and Erie Station and the said uptown New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

10. The defendant railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between its downtown terminal at Hudson Terminal, New York and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the defendant railroad between its downtown terminal, Hudson Terminal at New York City and the Journal Square Station, Jersey City and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

11. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff, Jersey City, and others in New Jersey, the effectiveness of the aforesaid tariff was suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter

of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

12. After due hearing the Commission on July 11, 1938, found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741, found:

(1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.

(2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

13. Following the promulgation of the report and order of July 11, 1938, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, Hudson & M. R. Co. *vs.* U. S., 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District Court for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court for the District of New Jersey, Hudson & M. R. C. *v.* United States, 33 Fed. Supp.

495, which was affirmed by the Supreme Court, Hudson & Manhattan R. Co. *v.* U. S., 313 U. S. 98.

14. Upon petition of the defendant railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten cent fare on its downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. On November 9, 1942, notice was served upon the plaintiff intervener of such proceeding and his timely intervention in such proceeding was consented to. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

15. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in Increased Railway Rates, Fares and Charges, 1942, supra, the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight-cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that

a substantial portion thereof should be sought through increased divisions on the interline traffic."

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an eight-cent or a nine-cent fare than for a ten-cent fare on the downtown line of respondent."

16. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine-cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare-collection boxes. In connection therewith, the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

17. The plaintiff, Jersey City, on July 14, 1943, answered the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters therein alleged and thereby afford the plaintiff its right of cross examination. The plaintiff intervener filed his answer to the railroad's supplemental petition on July 19, 1943. He opposed the proposed modification in rates on the ground that such modification would result in addi-

tional inflation, and he requested that the Commission reconsider its June 8th order and restore the downtown fare to the eight cent level, stating:

> "In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."

18. On August 3, 1943, upon the facts as aforesaid, without according the plaintiffs further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

19. In so providing for increased fares on the downtown line whereby the regular patron or so-called commutation passenger would be required to pay nine and one-eleventh cents per ride, and the occasional rider ten cents per ride in lieu of the nine-cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons herein stated,

should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

In the original report and order of the Commission made July 11, 1938, 227 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight-cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, Hudson & M. R. Co. *v.* U. S., supra, and affirmed by the Supreme Court of the United States, Hudson & Manhattan R. Co. *v.* U. S., supra. A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649 and again in its report and order of August 3, 1943.

20. On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, having for its purpose the enjoining of the report and order of August 3, 1943. Application was made, upon filing said bill, for a temporary restraint against putting into effect said order and a statutory court was duly established to hear said application.

21. On its own motion, by order dated September 18, 1943, and prior to hearing of the application for a temporary restraint, the Interstate Commerce Commission reopened the instant proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943;" and to afford "any party hereto * * * the right to cross examine adverse witnesses."

22. Both the plaintiff and the intervener plaintiff excepted to the restrictions and limitations imposed by the

Commission's aforesaid order for supplemental hearing, insisting at the start of the hearing and repeatedly throughout the proceeding, that the hearing be broad enough to include evidence of the defendant railroad's revenues, expenses and earnings since the closing of the original hearing in the matter. Both plaintiffs excepted to the interpretation given by the trial examiner to the Commission's order of September 18th re-opening hearing in that he refused to receive any testimony with respect to the railroad revenue except testimony confined strictly to the difference in revenue resulting from the authorized cash fare and the combination cash and token fare. Both plaintiffs endeavored to submit proof that the railroad's patronage had been increased by amount in excess of thirty per cent in 1943 over 1941 and that no additional revenue was necessary or could be properly allowed in excess of the existing eight cent local downtown fare. This proffer was in accord with the decision of the Commission of June 8, 1943 reading:

> "Under present fares (eight cents on the local downtown line and ten cents on the uptown line) it would be necessary for its annual traffic to increase by about thirty per cent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

That same order also stated:

> "It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

23. At that hearing of September 18, 1943, both plaintiffs sought to introduce in evidence a "Condensed Income Statement" of the defendant railroad covering the months of July 1942 and July 1943 and the first seven months of 1942 and 1943 respectively. That exhibit was

excluded from the record. It was contended it showed the repeatedly improving financial position of the railroad even after all of its alleged operating expenses and that at the existing eight cent fare the railroad is earning more than the Commission anticipated it would at the nine cent fare in its order of June 8, 1943. The contention was further made that the offered exhibit showed that an alleged expense of $20,000 a month of the carrier for self insurance cost was entirely unwarranted and should be eliminated and if it were, that the defendant railroad would earn at the existing eight cent fare far in excess of all interest charges, a condition not anticipated at the nine cent fare, by the Commission in said order.

24. Thereafter, on October 14, 1943, the intervener plaintiff filed with the Commission, a written motion for modification and amendment of its said order of September 18, 1943. In that motion, the municipal plaintiff joined by letter. The motion was based on the restrictive scope of the supplemental hearing of September 18, 1943 and requested the re-opening of the proceeding to permit the plaintiffs to introduce the evidence excluded by the examiner and such additional evidence as might be necessary in order to bring the record alleged to be obsolete and stale, down to date.

25. That motion was overruled by the Commission in its "Second Report on Further Hearing" issued November 2, 1943, wherein the Commission granted the petition of the Railroad to substitute token and cash fares on its downtown and uptown lines in lieu of theretofore authorized cash fares.

26. The Commission in its opinion of November 2, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as

made in the second report * * * the motion will therefore be overruled."

27. The order of the Commission of November 2, 1943 permitted the railroad to file and make effective the new tariffs on fifteen days notice.

28. With reference to the economic stabilization and inflation branch of this case, the Commission in its order of June 8, 1943, which increased the downtown fare cash from eight cents to nine cents said:

> "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

29. On November 18, 1943 an amended complaint was filed in this cause by the plaintiff, City of Jersey City. Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervened as a plaintiff by petition. The above facts were referred to in the amended complaint and the intervener's petition. The amended complaint of the plaintiff, City of Jersey City, prayed that upon final hearing of this cause that this Court order, adjudge and decree that the orders of the Commission dated June 8, 1943 and November 2, 1943, insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company, is, and at all times has been, beyond the lawful authority of said Commission, and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Prayer was also had for a temporary injunction and restraint enjoining the defendants from so much of said orders of June 8, 1943 and November 2, 1943 as permits the establishment of any local interstate fare in excess of

eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener plaintiff prayed that pending the final hearing of this cause, the Court issue an interlocutory and permanent injunction and restraint enjoining the defendants from so much of said orders of June 8 and November 2, 1943, as permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener also prayed that upon final hearing this Court adjudge, order and decree that said orders of June 8 and November 2, 1943, insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company, are, and have at all times been, in violation of the Stabilization Act of October 2, 1943 enacted by the Congress; and said orders are and have at all times been, beyond the lawful authority of said Commission and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

30. The defendant, United States of America, filed a neutral answer. The defendants, Interstate Commerce Commission, and Hudson & Manhattan Railroad Comany, filed their respective answers to the amended complaints and the intervener's petition. Said answers in substance admitted the making of the orders of the Commission of June 8, 1943 and November 2, 1943, denied that the plaintiffs were not allowed a full and fair hearing, denied that said orders failed to give effect to the stabilization program and the efforts of the national government to cut down the cost of living and alleged that said orders were made after full hearing and consideration of proofs and arguments of all parties and that they are fully supported by the evidence before the Commission and by the Commission's findings based on such evidence. In addition, the defendant railroad in its answer and the defendant, Interstate Commerce Commission in its amended answer, alleged that the relief sought by the plaintiffs is premature, saying

that neither of the plaintiffs have exhausted the administrative remedies provided in cases of this kind and further, that both the plaintiffs are estopped from now questioning the reasonableness of the nine cent fare found reasonable by the Commission's report of June 8, 1943. They allege that the estoppal arises because neither of the plaintiffs has ever filed a petition with the Commission asking reargument or reconsideration of the order of June 8, 1943 although "Rule 101 of the General Rules and Practice of the Commission specifically provides for such petitions in connection with any decision or order of the Commission."

31. Following hearing on the application for an interlocutory injunction on November 26, 1943, this Court issued its findings and order restraining and enjoining the defendants, pending final hearing in this proceeding, from putting into effect the report and orders of the Interstate Commerce Commission of June 8, 1943 and of November 2, 1943 insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company.

32. Final hearing was had in this cause on December 14, 1943.

Conclusions of Law.

1. Both the plaintiff, Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, are proper parties to bring and maintain this proceeding as plaintiffs herein.

2. The petition by the defendant carrier, Hudson & Manhattan Railroad Company, to the Interstate Commerce Commission of July 27, 1942 asking for a ten cent fare on its downtown line, was one for additional revenue and the orders of the Commission of June 8, 1943 and November 2, 1943 were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing.

3. Both the plaintiff, City of Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, properly appeared as protesting parties before the Interstate Commerce Commission and were and are entitled to a full and fair hearing by that Commission.

4. Both the plaintiff and the plaintiff intervener, were denied a full and fair hearing in that they were deprived of the right to cross examine witnesses and to present testimony on matters which have a substantial bearing upon the right of the Hudson & Manhattan Railroad Company to fares higher than fares charged on September 15, 1942.

5. That the Commission's said orders of June 8, 1943 and November 2, 1943 authorizing increases in fares failed to give effect to the economic stabilization program and efforts of the national government to keep down the cost of living, particularly in that the Commission erroneously assumed that said increases would not have any effect on the program to keep down the cost of living.

6. That both the plaintiff and the intervener plaintiff exhausted their administrative remedies before instituting this proceeding.

7. That the plaintiff, City of Jersey City, and the intervener plaintiff, Fred M. Vinson, Economic Stablization Director, by Chester Bowles, Price Administrator, are entitled to the setting aside and annulling of said orders of June 8, 1943 and November 2, 1943 and to a perpetual injunction against their enforcement insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company.

8. That the plaintiff, City of Jersey City, and intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, are not estopped from questioning the validity of the nine cent fare on the downtown line of the defendant, Hudson & Manhattan Railroad as authorized in the Commission's

order of June 8, 1943 or the further increases in said downtown fare authorized by the Commission's order of November 2, 1943.

A decree shall be entered herein accordingly.

_____,

United States Circuit Judge.

_____,

United States District Judge.

Newark, New Jersey, January 12, 1944.

APPENDIX "D".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener-Plaintiff*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants*.

Final Decree Granting Permanent Injunction.

This action coming on to be heard upon final hearing before a statutory court consisting of Honorable Gerald McLaughlin, Judge of the Circuit Court, and Honorable Guy L. Fake and Honorable Thomas F. Meaney, Judges of the District Court, in which action an amended complaint was filed by the City of Jersey City as plaintiff, against the United States of America, Interstate Commerce Commis-

sion and Hudson & Manhattan Railroad Company, defendants, for the purpose of setting aside, annulling, and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28, U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943, in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), in which action Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration, intervened, and filed his complaint as intervener plaintiff, in the presence of Charles Hershenstein, Charles A. Rooney, and S. S. Eisen, appearing for the plaintiff, City of Jersey City; Harry R. Booth, appearing for Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervener-plaintiff; John F. Finerty and John Buck, appearing for the Hudson & Manhattan Railroad Company, and E. M. Reidy, appearing for the Interstate Commerce Commission, defendants, and the court having examined the pleadings and the record before the Commission and having taken proofs orally in open court and having heard and considered the oral arguments of counsel and the briefs filed, from which good and sufficient cause appears that the City of Jersey City, plaintiff, and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration, intervener-plaintiff are entitled to the relief prayed for, to wit, the setting aside and annulling of said orders of June 8, 1943 and November 2, 1943, and to a perpetual injunction against enforcement so far as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and the Court having filed its opinion and findings of fact and conclusions of law; and upon all the pleadings and proceedings heretofore had herein;

It is, on this 14th day of January, 1944, ORDERED, ADJUDGED and DECREED, that the rate order issued by Interstate Com-

merce Commission of June 8, 1943, in a matter entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the said defendant, Hudson & Manhattan Railroad Company, are hereby set aside, annulled, and perpetually enjoined, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.); and

It is FURTHER ORDERED, ADJUDGED and DECREED, that the defendants, United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, their agents, representatives, employees and servants, be and they hereby are permanently enjoined and restrained from enforcing and putting into force and effect said orders of the Interstate Commerce Commission bearing date June 8, 1943 and November 2, 1943, hereinabove more particularly referred to, so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and

It is further ORDERED, ADJUDGED and DECREED, that the proceedings are hereby remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the court filed herein.

GERALD MCLAUGHLIN,
United States Circuit Court Judge.
THOMAS J. MEANEY,
United States District Court Judge.